IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
December 12, 2006 Session

STATE OF TENNESSEE v. DONALD MICHAEL PETTY

Appeal from the Criminal Court for Sumner County
No. 755-2005 Jane W. Wheatcraft, Judge

No. M2006-00705-CCA-R3-CD - Filed March 8, 2007

The defendant, Donald Michael Petty, was indicted on one count of possession with intent to sell or deliver a Schedule I controlled substance, one count of possession with intent to distribute a Schedule II controlled substance, and one count of possession of drug paraphernalia. The defendant moved to suppress evidence resulting from the search warrant that led to the defendant's arrest. The trial court granted the motion, and the state appeals. We conclude that the motion to suppress was properly granted and affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed.

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which NORMA MCGEE OGLE and ALAN E. GLENN, JJ., joined.

Robert E. Cooper, Jr., Attorney General and Reporter; Mark A. Fulks, Assistant Attorney General; Lawrence Ray Whitley, District Attorney General; Dee David Gay, Assistant District Attorney General, for the appellant, State of Tennessee.

Robin K. Barry, Nashville, Tennessee (on appeal); Michelle H. Thompson (at trial), Nashville, Tennessee, for the appellee, Donald Michael Petty.

OPINION

On June 8, 2005, Investigator Shane Woodard with the Gallatin Police Department advised Investigator Michael McLerran of the Sumner County Sheriff's Department that he had arrested two men, Steven Sagar and Jeremy Crawford, for possession of methamphetamine, cocaine, and Valium. According to Woodard, Sagar stated that shortly before his arrest he had been at a house in White House, Tennessee where there was approximately eighteen ounces of ice methamphetamine and a large amount of cocaine. McLerran and Woodard then took Sagar to the White House Police Department, where White House officer Matt Marshall interviewed Sagar. During the interview, Sagar repeated his earlier statement, and he also noted that the house was at 1019 Winding Way, he

was there at 4:00 p.m. that day, and that someone would, later that day, possibly trade seven jars of ecstasy for some of the methamphetamine. Sagar stated that the resident of the house was a man he knew only as "Michael," and that the resident drove a red truck containing lawn care equipment.

Following the interview, the three officers took Sagar to the Winding Way house, which Sagar identified as the house in question. Officers confirmed the house's address by the address listed on the mailbox outside the house. Officers also observed a red pickup truck hooked to a trailer with lawn care equipment parked outside the house.

Two days later, on June 10, 2005, McLerran sought and obtained a search warrant for the residence. The Affidavit in Support of Search Warrant contained the following Statement of Facts in Support of Probable Cause:

> This affidavit is made by Inv. Michael McLerran, who has 7 years of law enforcement experience as a sworn police officer and 6 year[s] as a narcotics investigator, now testifies herein which is based upon information received from other law enforcement officers, unless otherwise stated, which your affiant believes to be true, and is as follows:
>
> 1. On June 8th, 2005 your affiant was contacted by Inv. Shane Woodard of the Gallatin Police Dept. [H]e advised that he had arrested one Steven Sagar and Jeremy Crawford with Possession of app. ½ ounce of Ice Methamphetamine, and app. one half ounce of Cocaine and app. 30 Valium, in Gallatin, Sumner County Tennessee.
>
> 2. Inv. Woodard advised that Steven Sagar had told him that there was a house in Whitehouse, Tennessee that Steven Sagar had been at earlier on this date where there was app. 18 oz of Ice Methamphetamine, and a large amount of Cocaine.
>
> 3. Your affiant and Inv. Shane Woodard went to the Whitehouse Police Dept. with Steven Sagar and made contact with officer Matt Marshall of the Whitehouse Police Dept. During an Interview of Steven Sagar he advised that he was at 1019 Winding Way Whitehouse Tennessee at app. 4:00 pm on June 8th, 2005 while there he observed app. 18 oz. Of Ice Methamphetamine, and a large amount of Cocaine, and that there were possible [sic] going to be some seven jars of Ecstasy that was going to be traded for some of the Ice Methamphetamine later in the day. Your affiant and other officers took Steven Sagar to the address provided by him as 1019 Winding Way Whitehouse, Sumner County Tennessee. Steven stated that Michael (Last Name Unknown) who lived at the house drove a red truck and had a lawn care business. When your affiant arrived at 1019 Winding Way your affiant observed a Red Pickup truck hooked to a trailer with lawn care equiptment [sic]. Steven Sagar pointed out the house as being 1019 Winding Way and this was confirmed by the address on the Mailbox.

> 4. Inv. Jerry Carpenter arrived at the Whitehouse Police Dept. and he advised that during questioning, Jeremy Crawford and the Co-defendant had advised him and Steven Sagar had been to the house on Winding Way where a guy named Michael lived and if there was any drugs there Jeremy did not know about them.
>
> 5. Based on the afformentioned [sic] probable cause your affiant believes that there is probable cause to search 1019 Winding Way Whitehouse, Tennessee for Ice Methamphetamine, Cocaine, and or Ecstasy.

The search conducted by McLerran and other officers revealed eighty-three MDMA or "ecstasy" pills, seventeen grams of methamphetamine, and various items of drug paraphernalia, including baggies, scales, and smoking pipes. In July 2005, the house's resident, by now identified as the defendant, Donald Michael Petty, was arrested and subsequently indicted by a Sumner County grand jury for possession with intent to sell or deliver a Schedule I drug (MDMA) and possession with intent to sell or deliver more than 0.5 grams of a Schedule II drug (methamphetamine).

In February 2006, the defendant filed a motion to suppress the evidence seized from his home. The defendant raised three challenges to the sufficiency of the Affidavit in Support of Search Warrant. First, the defendant argued that the affidavit failed to establish the informant's basis of knowledge. Second, the defendant argued that the affidavit failed to establish the criminal informant's veracity or the reliability of his information. Finally, the defendant argued that the affidavit failed to establish a nexus between the crime and the place to be searched. In March 2006, the trial court granted the defendant's motion to suppress all evidence obtained pursuant to the search warrant obtained in this case. The state then filed a timely appeal.

STANDARD OF REVIEW

A trial court's factual findings in a motion to suppress hearing are conclusive on appeal unless the evidence preponderates against them. State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996); State v. Jones, 802 S.W.2d 221, 223 (Tenn. Crim. App. 1990). Questions about the "credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." Odom, 928 S.W.2d at 23. The prevailing party is entitled to the strongest legitimate view of the evidence and all reasonable inferences drawn from that evidence. State v. Hicks, 55 S.W.3d 515, 521 (Tenn. 2001). The application of the law to the facts as determined by the trial court is a question of law which is reviewed de novo on appeal. State v. Yeargan, 958 S.W.2d 626, 629 (Tenn. 1997). Because the trial court's findings came from its application of the law to facts in the affidavit, we will review the trial court's findings de novo.

THE PROBABLE CAUSE REQUIREMENT FOR SEARCH WARRANTS

The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures, and "Article 1, Section 7 [of the Tennessee Constitution] is identical in intent and purpose with the Fourth Amendment." State v. Downey, 945 S.W.2d 102, 106 (Tenn. 1997)

(citing Sneed v. State, 221 Tenn. 6, 423 S.W.2d 857, 860 (1968)). In order to comply with the Fourth Amendment, the state must seek the issuance of a search warrant based upon probable cause from a detached magistrate before a house is searched. State v. Jacumin, 778 S.W.2d 430, 432 (Tenn. 1989) (citing Johnson v. United States, 33 U.S. 10, 13-14 (1948)). Probable cause "is satisfied if the facts and circumstances are such that a reasonably prudent person would be warranted in believing that an offense had been committed and that evidence thereof would be found on the premises to be searched." Green v. Reeves, 80 F.3d 1101, 1106 (6th Cir. 1996) (citing United States v. Besase, 521 F.2d 1306, 1307 (6th Cir. 1975)); see also State v. Meeks, 876 S.W.2d 121, 124 (Tenn. Crim. App. 1993). In Tennessee, a finding of probable cause supporting the issuance of a search warrant must be based upon evidence included in a written and sworn affidavit, which sets forth sufficient facts upon which a neutral and detached magistrate can find probable cause for issuing the warrant. Tenn. Code Ann. §§ 40-6-103, -104 (2006); Tenn. R. Crim. P. 41(c); Jacumin, 778 S.W.2d at 432; State v. Bryan, 769 S.W.2d 208, 210 (Tenn. 1989). The need for the magistrate's independent judgment means that the affidavit must contain more than merely conclusory allegations by the affiant. "Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police." United States v. Ventresca, 380 U.S. 102, 109 (1965).

Furthermore, when the affidavit supporting the search warrant is based upon information provided by a criminal informant, probable cause must be based upon the two-pronged test announced by the United States Supreme Court in its opinions in Spinelli v. United States, 393 U.S. 410, 416 (1969), and Aguilar v. Texas, 378 U.S. 108, 114 (1964). Specifically, the affidavit in support of the search warrant must contain facts establishing the basis of the informant's knowledge, *and* the affidavit must contain facts which establish the credibility of the informant or the reliability of his information. Jacumin, 778 S.W.2d at 431-32; see also State v. Cauley, 863 S.W.2d 411, 417 (Tenn. 1993); State v. Moon, 841 S.W.2d 336, 338 (Tenn. Crim. App. 1992).

ANALYSIS

The "Basis for Knowledge" Requirement

In this case, both the state and the defendant admit that the first prong of the Aguilar-Spinelli test is met. Sagar, the informant, stated that he had been in the defendant's home within the forty-eight hours prior to issuance of warrant and had observed approximately eighteen ounces of methamphetamine and a large amount of cocaine in the home. The defendant admits, and our courts have held, that an informant's personal knowledge of criminal activity by the defendant is adequate to meet the "basis for knowledge" requirement. See State v. Smotherton, 201 S.W.3d 657, 664 (Tenn. 2006). As such, resolution of this case will turn on the second prong of the Aguilar-Spinelli test.

The "Veracity" or "Reliability" Requirement

In satisfying the second, or "veracity," prong of the Aguilar-Spinelli test, the credibility of a criminal informant is usually shown "by his having previously given relevant information to law

enforcement which has proven to be reliable." Moon, 841 S.W.2d at 339. An affidavit void of facts sufficient to establish the credibility of the criminal informant may still establish probable cause upon a showing "that the information given by the informant is otherwise reliable." Id. Even if the affidavit fails to establish the criminal informant's credibility or the reliability of the informant's information, this defect may be cured by sufficient independent police corroboration. Jacumin, 778 S.W.2d at 436.

In this case, the state argues that the "minute particularity" of the details supplied by the informant is enough to satisfy the "veracity" prong of the Aguilar-Spinelli test. According to the state, these minutiae include (1) the exact time and date (4:00 p.m. on June 8, 2005) when the informant visited the home, (2) the address of the home, (3) the name of the home's occupant, (4) the fact that the occupant drove a red pickup truck and operated a lawn care business, (5) a specific amount (eighteen ounces) of methamphetamine described by the informant, (6) and the possibility that someone would be coming to the house to trade ecstasy for some of the methamphetamine. The state also argues that the police, by visiting the house and confirming the details regarding the address and the occupant's vehicle, independently corroborated the informant's information. The defendant, however, argues that the court correctly determined that the veracity prong was not met because the affidavit failed to show that the informant was credible or his information reliable. The defendant particularly notes that the informant did not allege that the defendant was associated with the informant's own criminal activities, nor did the informant make any claim that the defendant was the source of drugs found on the informant or Crawford. Furthermore, the defendant claimed that the police did not independently corroborate the informant's allegations; the police took the informant with them when they identified the house, and the only information that the police were able to confirm—the house's address and the presence outside the house of a red truck connected to a trailer with lawn equipment—involved "non-suspect behavior," and not information of the type necessary to establish the veracity of a criminal informant. This court agrees with the defendant's arguments.

In this case, the affidavit in support of the search warrant makes no claim that the informant has any previous history of supplying accurate and reliable information to law enforcement. As such, "there is no circumstance provided from which the magistrate could infer that the informant's information was reliable because he was a credible person." Moon, 841 S.W.2d at 339. Therefore, the affidavit at issue here would have had to show that the information supplied by the informant was reliable. The affidavit did not meet this requirement. In many drug informant cases, the validity of the search warrant has been upheld where the informant actually saw the defendant selling drugs. See State v. Robert Gene Mayfield, No. M2004-01539-CCA-R3-CD, 2005 WL 135737, at *3 (Tenn. Crim. App. June 3, 2005); State v. Abernathy, 159 S.W.3d 601, 604 (Tenn. Crim. App. 2004). Here, the affidavit does not mention that the informant witnessed the defendant selling drugs, nor does the affidavit mention the defendant selling drugs to the informant. Our courts have upheld the validity of search warrants where the informant merely saw the defendant in possession of illegal drugs, but in those cases other indicia of reliability were present that are not present in the instant case. See generally State v. Williams, 193 S.W.3d 502, 508-09 (Tenn. 2006) (informant who described specific drugs in specific locations in defendant's home was defendant's paramour, who lived with

defendant); State v. Casey Watson, No. E2005-02054-CCA-R3-CD, 2006 WL 2032528, at *5 (Tenn. Crim. App. July 20, 2006) (informant who observed large quantity of crack cocaine in defendant's residence had previously supplied reliable information to law enforcement). Nor can the fact that the informant made a statement against his penal interest be used to support the state's argument that the defendant's information is credible, as the informant never tied his statement against interest to the defendant's alleged criminal enterprise. See generally Moon, 841 S.W.2d at 340 ("absent the affidavit in this case providing how the admission against interest relates to the criminal activity, the targeted premises or the defendant, it carries no weight toward enhancing the reliability of the informant's information."). Thus, the state failed to show that the informant or his information was reliable.

The state's failure to meet its "reliability" burden could still have been overcome by independent police corroboration. However, the police did not meet the applicable standard in this case. Our courts have held that "observations by police are sufficient if they provide an 'unusual and inviting explanation,' even though the observations are 'as consistent with innocent as with criminal activity.'" Moon, 841 S.W.2d at 341 (quoting Wayne R. LaFave, Search and Seizure, § 3.3(f) at 683 (2d ed. 1987)). Furthermore, the police must corroborate "more than a few minor elements of the informant's information . . . especially if the elements relate to non-suspect behavior." Smotherton, 201 S.W.3d at 664 (citing Moon, 841 S.W.2d at 341)).

Many of the post-Jacumin drug cases in which police corroboration was held sufficient to justify a search warrant involved the police confirming, via one of the senses, drug manufacturing or sale taking place. See generally State v. Carter, 160 S.W.3d 526, 533-34 (Tenn. 2005) (prior to obtaining search warrant for house where methamphetamine was allegedly being made, officer walked past defendant's house and smelled burning chemicals and heard persons running around inside); State v. Mark Ray Delashmit, No. W2004-00946-CCA-R3-CD, 2005 WL 1388041 (Tenn. Crim. App. June 13, 2005) (informant wore a wire, which allowed police to hear defendant negotiating drug deal with informant). In the instant case, the police did not independently confirm that the defendant was in possession of drugs before obtaining the warrant; they did not see the defendant selling drugs, nor did they ask an informant to "wear a wire," as did the informant in Delashmit. The only information that the police were able to independently confirm was the address of the house and the fact that a red pickup truck containing lawn equipment was parked outside. Such information was of the "non-suspect" type that our courts have held insufficient for purposes of independent corroboration under the reliability prong of Aguilar-Spinelli. See generally Smotherton, 201 S.W.3d at 664 (prior to search warrant, police were only able to confirm that defendant resided at house to be searched; Tennessee Supreme Court held that this information "involves only one element of non-suspect behavior and offers little support to the credibility of the informant or the reliability of the informant's information regarding the occurrence of drug transactions at the defendant's residence."). As such, adequate police corroboration of the informant's information was not present in this case. Absent both police corroboration and a showing that the defendant or his information was reliable, the second prong of the Aguilar-Spinelli test failed in this case, and the search warrant for the defendant's home should not have been issued.

CONCLUSION

The affidavit in support of the search warrant in this case contained information that established the basis for the informant's knowledge. However, the second prong of the Aguilar-Spinelli test, which requires either a showing that the informant or his information is reliable or independent corroboration of the informant's information, was not satisfied. The trial court was correct in suppressing the evidence that resulted from the improperly-issued search warrant; therefore, the judgment of the trial court is affirmed.

D. KELLY THOMAS, JR., JUDGE